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No. 88-1286

In The

Supreme Court of the United States

October Term, 1988

LARRY HENRY CARTER, COURTNEY DEMARIS CARTER, and MAURICE LaBELLE,

Petitioners,

v.

BROADLAWNS MEDICAL CENTER, POLK COUNTY HOSPITAL TRUSTEES, DOUGLAS HART, JOHN AHERN, WILLIAM DYAR, CAROLE ROMINE, MARGARET STOUT, JEANNE MILLER, MILTON BROWN, CHARLES INGERSOLL, QUENTIN HUNTER, LLOYD KAUFMAN, PETER PINTUS, RAYMOND RUNKEL AND IOWA INTERFAITH AGENCY FOR PEACE AND JUSTICE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the religion clauses of the First Amendment to the United States Constitution prohibit a public hospital, which is owned and controlled by the government, from spending taxpayers' monies to employ a chaplain.

LIST OF PARTIES

This action was filed in the United States District Court for the Southern District of Iowa by Larry Henry Carter. Initially, Mr. Carter named as Plaintiffs himself, his daughter Courtney, American Atheists, John Doe, and Jane Roe. By the time of trial, American Atheists had withdrawn as a party plaintiff, as had Jane Roe. John Doe was identified as Maurice LaBelle. Each of the individual Plaintiffs is a natural person, residing in Des Moines, Polk County, Iowa. Carter and LaBelle are white adult males, and Courtney Carter is a white minor female, the daughter of Larry Carter. Mr. Carter and Mr. LaBelle claim to be state and federal taxpayers. All parties claim to profess atheism, and eligiblity for medical treatment at Broadlawns Medical Center (BMC).

Broadlawns Medical Center is a county public hospital, organized and existing pursuant to Chapter 347, *Code of Iowa* (1985). Under Section 347.9, *Code of Iowa* (1985), the hospital is governed by a Board of Trustees who were, at all times material, Defendants John Ahern, Milton Brown, William Dyar, Douglas Hart, Jeanne Miller, Carole Romine, and Margaret Stout. Defendants Charles Ingersoll was Executive Director of the hospital, and Defendants Quentin Hunter and Lloyd Kaufman were, respectively, the Director of the hospital and the Director of Social Services.

Defendant Iowa Interfaith Agency for Peace and Justice is a nonprofit organization composed, primarily, of ministers from various religious denominations. The Agency has historically provided assistance to the State

LIST OF PARTIES – Continued

of Iowa in conducting searches and interviews for chaplains placed in state institutions, such as state prisons and mental health institutions. When the Board of Trustees determined that BMC should hire a chaplain, $1,250 was allocated for expenses to be paid to the Agency to advertise the position and initially screen chaplaincy applicants. Two applicants, including current BMC Chaplain Maggie Rogers, were recommended by the Agency to the Board of Trustees as candidates qualified for the BMC position. The individual Defendants Ramon Runkel and Peter Pintus are both ordained ministers. Each has been a member of the Iowa Interfaith Agency for Peace and Justice, with Reverend Runkel serving on the chaplaincy search committee in the final interviewing stages. Both served as volunteer chaplains at BMC during various periods of time preceding the employment of a full-time chaplain.

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Respondents, Broadlawns Medical Center, et al., respectfully request that this Court deny the Petition for Writ of Certiorari filed by the Petitioners, Larry Henry Carter, et al., seeking review of the opinions and decisions of the Court of Appeals of the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 857 F.2d 448 (8th Cir. 1988). The post-trial memorandum opinion of the district court is reported at 667 F.Supp. 1269 (S.D. Iowa 1987). The district court's order regarding post-trial motions is reported at 672 F.Supp. 1149 (S.D. Iowa 1987). All of the above are set forth in appendix to the Petition for Writ of Certiorari.

JURISDICTION

Respondents acquiesce in Petitioners' statement of jurisdiction.

The judgment of the court of appeals was made and entered on September 13, 1988. Petitioners' Petition for Rehearing en banc was denied on November 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .
> U.S. Const. amend. I.

RESPONDENTS' STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Broadlawns Medical Center (BMC) is the largest county public hospital in the State of Iowa. BMC is also unique, in comparison to all other public county hospitals in Iowa, in having its own psychiatric unit. Named the Sidney Sands Unit, the psychiatric facility serves patients in Polk County and, occasionally, from surrounding counties, at public expense. In counties other than Polk, psychiatric patients are placed in one of the four mental health institutes maintained by the State of Iowa and located in Mount Pleasant, Independent, Cherokee and Clarinda.

Psychiatric patients at BMC constitute approximately fifty percent (50%) of the inpatient population, and the average length of stay of psychiatric patients is almost triple that of patients in the medical unit of the hospital. In addition, there is an adolescent psychiatric unit which deals mainly with chemical abuse problems, and may house up to sixteen (16) patients.

While not all of the patients in Sidney Sands or the adolescent psychiatric unit have been involuntarily committed, psychiatric patients do not have freedom of movement, and access to the psychiatric units is restricted. The psychiatric units are "lock-up" wards. That is not true of the medical unit of the hospital; however, the patients receiving medical attention are restricted in their mobility by their illness or injury.

The Volunteer Chaplaincy Program at BMC

For many years preceding this dispute, BMC had a volunteer chaplaincy program. Volunteer chaplains were actively sought for involvement in the program and all volunteer chaplains were under the general supervision of the Director of Social Services, most recently Lloyd Kaufman. The volunteer chaplains at Broadlawns Medical Center performed a variety of services for patients, none of which were challenged in the Complaint or First Amended Complaint. A primary task was to interview new admissions to determine if the newly admitted patients had any needs or requests which could be filled by the chaplains. The volunteer chaplains would, upon request, provide prayer and other religious services to patients, of their family members, and would contact the local minister of a particular patient, upon request. Volunteer chaplains also counseled both patients and family members. Volunteer chaplains would visit the psychiatric units, although most volunteers did not feel adequately prepared to meet the needs of long-term psychiatric patients, either by experience or availability of time required. As noted by both chaplains and physicians, the psychiatric unit had a significant unmet demand for chaplaincy services.

The direct testimony of all of the individuals involved with the volunteer chaplaincy program and patient services agreed that the volunteer chaplaincy program was decreasingly able to meet the needs of the patient population in the time period preceding the decision to employ a full-time chaplain. Both the Trial Court and the Court of Appeals recognized this fact in their

respective decisions. Despite efforts by Lloyd Kaufman and the volunteer chaplains to recruit additional help, chaplaincy services available did not meet the needs of the BMC patient population.

Employment of a Full-Time Chaplain

At least as early as 1972, the issue of BMC employing a full-time chaplain came before the Board of Directors. From the minutes of the May 9, 1972, Board of Trustees meeting, it is apparent that Ramon Rankel advocated the employment of at least one full-time chaplain at Broadlawns, but that a decision on the matter was indefinitely postponed by the Board of Trustees. The matter was dormant for approximately the next twelve (12) years, coming before the Board again, in the meeting of the Board of Trustees on December 13, 1983. In the meeting of the Board of Trustees on January 10, 1984, a motion was made and carried which opened for discussion the potential employment of a full-time chaplain at BMC. This was followed by the development of a job description for a medical center chaplain by the personnel committee of BMC in a meeting of February 9, 1984, and subsequently modified into the current form being used at BMC and supplemented by Lloyd Kaufman and Maggie Rogers, the chaplain employed (App. 1-3).

The Board of Trustees of BMC voted to employ a full-time chaplain at the regularly scheduled meeting of June 12, 1984, with a salary range of $18,000 to $23,000. On October 9, 1984, the Board of Trustees approved funding of $1,250 for employment of the Iowa Interfaith Agency

for Peace and Justice for the initial chaplaincy advertising and screening process.

The Board of Trustees at BMC held regular monthly meetings throughout 1984. During the months preceding the filing of this action, Larry Carter wrote to BMC Trustees and employees, opposing the hiring of a chaplain by BMC on legal and personal grounds. Mr. Carter also attended meetings of the Trustees wherein he participated in discussions of the chaplaincy issue, and expressed his opinions in open meeting. During his attendance at the meetings, Mr. Carter was a member of the Primary Care Advisory Board at BMC, and identified himself in both that capacity, and the capacity as an atheist and representative of American Atheists, Inc.

Due to the filing of the instant action on November 1, 1984, the Board of Trustees voluntarily refrained from proceeding to hire a chaplain, anticipating a judicial resolution of Carter's request for an emergency restraining order. After nine months of voluntary restraint, however, on August 8, 1985, the Board of Trustees moved to employ a chaplain within sixty (60) days, unless enjoined from so doing by the trial court. On September 9, 1985, the Honorable Donald O'Brien denied Plaintiffs' Request for an Emergency Restraining Order. Having reviewed recommendations by the Iowa Interchurch Agency for Peace and Justice, Defendants and hospital employees interviewed chaplaincy candidiates. Chosen for the position of BMC chaplain was Maggie Alzeno Rogers, who began full-time employment as a paid chaplain on November 20, 1985.

Functions and Duties of the Full-Time Chaplain

The chaplain, Maggie Alzeno Rogers, testified at the time of trial commencing on May 20, 1986, at that time having been gainfully employed as a chaplain at BMC for approximately six months. Chaplain Rogers possesses a Master's of Divinity Degree, and is trained in grief counseling and Clinical Pastoral Education, referred to as CPE. In her employment, Chaplain Rogers was given an office located in the basement of the central building of BMC, across from the Nauraine conference room, and wears a badge, that identifies her as "Chaplain Maggie Rogers." Testifying from the job description and her own experiences, Chaplain Rogers explained that since her employment, as a full-time chaplain, the volunteer chaplain program, which continued to operate, had been assigned the responsibility of interviewing new admissions, for the purposes of determining whether or not any further chaplaincy services were desired by patients who were new to the hospital, and to remove that responsibility from the full-time chaplain and thereby allow her to devote time to her other responsibilities.

Chaplain Rogers testified that her duties include:

a. following up on patient referrals received from the volunteer chaplains;
b. making preoperative calls on surgical patients, when her time permits;
c. upon referral, counseling the members of families of patients; and
d. making contacts in the intensive care unit at surgical waiting rooms.

Chaplain Rogers will provide "religious services" upon request, such as the administration of sacraments and

praying with a patient; she is also available for counseling to the staff of BMC and is part of an oncall coverage of all of the chaplains who participate in the volunteer chaplain program; she functions as a consultant to the medical and psychiatric staffs, and has been called in on occasion to deal with psychiatric patients who have had problems dealing with a faith or theological issue or who simply request in-depth counseling from the chaplain employed by BMC. Chaplain Rogers specifically testified to a number of factual examples reflecting this type of in-depth work with particular patients.

As the full-time, employed chaplain at BMC, Chaplain Rogers also coordinates the activity of the volunteer chaplains, attempts to recruit new chaplains to that program, and does contact clergy of patients at the hospital, upon request of the patient. Chaplain Rogers also initiated a weekly Bible study group at Broadlawns West, at the request of residents there.

Chaplains Rogers, Charles Hart, and Marcus Engelhardt testified to the concept of Clinical Pastoral Education (CPE) and duties of a chaplain, being those of supporting patients in their faith. Prohibited is any activity to convert or advocate belief in a particular religion. Chaplaincy in a hospital or institutional setting was defined as serving patient needs, listening, and supporting a patient in the patient's own frame of spiritual reference. Chaplain Rogers further testified that the volunteer chaplains were expected to adhere to the concept of CPE, not proselytizing patients, and to be trained in the concept of Clinical Pastoral Education. The supervisors of Chaplain Rogers, Lloyd Kaufman and Charles Ingersoll, both testified that in their opinion the existence

of a full-time chaplain would be a deterrent to any proselytization of patients by visiting clergy.

Chaplain Rogers admitted, openly, that she would perform "religious services" such as the administration of sacraments, or praying with an individual, or reading the Bible to that person, if the individual requested or, to do so upon request, with family members. Chaplain Rogers acknowledged that her office does contain religious symbols, such as pictures of Jesus Christ, symbolic representations of the cross, and that there are hymnals stacked on a table in the Nauraine conference room. This appears to be the extent of the "religious paraphernalia" of which the Plaintiffs complained. There is a single parking place reserved for visiting ministers in the front of the main entrance to BMC, and there is a space provided on the form that patients fill out upon admission to the hospital where the individual can list his or her religious preference, both of which are opposed by Plaintiffs.

The nature of the duties of the BMC chaplain are quite comparable to those tasks performed by the volunteer chaplains in the past, with the exception of Chaplain Rogers having undertaken the supervision and coordination of the volunteer chaplains, thereby relieving Lloyd Kaufman of that responsibility. Chaplain Rogers does not see new admissions, that task being delegated to the volunteer chaplains, which, in turn, allows Chaplain Rogers to "focus" her activities and meet needs that were not being met in the past, such as the residents at Broadlawns West and the in-depth work with particular patients at Sidney Sands.

II. PROCEEDINGS BELOW

Respondents acquiesce in the statement of the proceedings below set forth in the Petition for Writ of Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE QUESTION OF WHETHER TAXPAYERS' MONIES MAY BE USED BY A PUBLIC HOPITAL TO EMPLOY A CHAPLAIN WAS CORRECTLY DECIDED BY THE COURT OF APPEALS OF THE EIGHTH CIRCUIT.

A. The Court Of Appeals Was Correct In Its Analysis Of The Facts And The Application Of The *Lemon* Criteria.

In reviewing the decision of the United States District Court for the Southern District of Iowa, the Court of Appeals for the Eighth Circuit focused its attention on the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and overruled the district court, which had held that the employment of a chaplain at Broadlawns Medical Center failed two of the three *Lemon* elements, those being that the practice, in this case, the employment of a chaplain, must reflect a clearly secular purpose, and secondly, that the employment of a chaplain provided more than a mere incidental advancement of religion. Both the Court of Appeals of the Eighth Circuit and the United States District Court of the Southern District of Iowa held that the employment of a chaplain at Broadlawns Medical Canter did not give rise to undue entanglement between church and state.

1. The Secular Purpose

It is apparent from the job description (App. 1-3) and the actual testimony of the person performing the duties of chaplain that the ultimate object to be achieved was to provide a service and a spiritual aspect to the care of the patients, family members and staff at Broadlawns Medical Center, with more continuity and general availability than had been available with the volunteer chaplain program.

The employment of a chaplain at Broadlawns Medical Center is to provide immediate access on the part of patients, family members, and, in some instances, employees of the hospital, in the context of primary health care and psychiatric care, and in such a way as is defined, in the final analysis, by the patient or family member or employee, himself or herself, not by the chaplain, the Board of Trustees or even the Court.

It is for the purpose of providing services to patients that the chaplain was employed by Broadlawns Medical Center, and the testimony on that issue was consistent throughout the trial proceedings. Such testimony was clearly and correctly analyzed by the Court of Appeals of the Eighth Circuit in its decision; *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 451-2 (8th Cir. 1988).

The district court acknowledged that it was "a close question" whether the purpose of the chaplain was clearly secular, and in so doing, recognized the principles of Clinical Pastoral Education (CPE) were not only adhered to by Chaplain Rogers, but required by Broadlawns Medical Center in the employment of chaplains

and of those individuals functioning as volunteer chaplains. The district court, however, rejected the concepts as not clearly secular, because one of the main purposes is to meet the religious needs of patients. In so doing, the district court predicated its decision on the first step of the *Lemon* test upon a concept of total separation or absoluteness which this court cautioned against in *Lynch v. Donnelly,* 465 U.S. 668 (1984):

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . " Committee for Public Education and Religion Liberty v. Nyquist, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L.Ed.2d 948 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g., Zorach v. Clauson, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, 343 U.S., at 314, 72 S.Ct., at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the Frist Amendment's guaranty of the free exercise of religion." McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948).
>
> 465 U.S. at 673.

In rejecting the secular concepts of CPE and holding that the employment of a chaplain at Broadlawns Medical Center violates the first prong of the *Lemon* criteria, the

district court approached the issue in the absolute fashion, cautioned against by this Court and ignored a primary, functional component of the Clinical Pastoral Concept, and that being that it is the individual, be it patient, family member or employee, who defines his or her need, be it religious, spiritual, or otherwise, and in that sense, the delivery of any "religious services" by the chaplain to the patient are really incidental to the purpose and function of the chaplain, which is to serve and be a part of the wholistic approach to providing health care, primary or psychiatric. The district court failed to recognize that the practice, in this instance the employment of a chaplain, motivated in part by a religious purpose may still satisfy the initial element, that being a clear secular purpose; see *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). And it is clear, particularly in *Lynch v. Donnelly*, that the secular purpose need not be clear and overriding, but rather, must simply exist so that there is not a question that the statute or activity was completely derived from religious motivation.

The Court of Appeals for the Eighth Circuit correctly distinguished the difference, in finding a secular purpose, between an approach predicated upon reviewing the religious nature of an activity, *only*, and failing to consider all aspects of the challenged conduct, citing to *Lynch* and holding:

> *Lynch* made it clear that the presence of religious purposes would not doom a law or practice, as long as there was also a secular purpose.
>
> * * * * *

> Though the district court correctly observed that the challenged action need not be exclusively secular to pass the purpose test, 667 F.Supp. at 1279, in actuality it considered the presence of a religious purpose fatal, despite factual findings establishing a valid secular purpose.
>
> * * * * *
>
> In other words, the purpose of the chaplaincy was the same as that of the hospital generally – to help patients get well or at least to provide the best care possible for those who would not get well.
>
> * * * * *
>
> The district court in this case slipped into the same legal error made by the district court in *Lynch v. Donnelly,* by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause . . . ."
>
> 857 F.2d at 454.

The Court of Appeals for the Eighth Circuit correctly held that the employment of a chaplain at Broadlawns Medical Center passes the first element of the *Lemon* test. The employment of a chaplain does reflect a clearly secular purpose, and the religious aspect is incidental to the delivery of services related to primary health and psychiatric care in the hospital environment. The Court should deny the Petition for Writ of Certiorari and allow the decision of the Court of Appeals of the Eighth Circuit to stand on the issue of a secular purpose in the employment of a chaplain.

2. Broadlawns Medical Center's Employment Of A Chaplain Does Not Have The Effect Of Advancing Religion.

In addressing the second element of the *Lemon* test, the Court of Appeals of the Eighth Circuit held that the employment of a chaplain by Broadlawns Medical Center did not constitute any direct advancement of religion, reversing the decision of the district court, which had held, in part, that the payment of a chaplain to provide religious care, while acknowledging that the provision of religious care by the chaplain was not the chaplain's only assigned duty, violated the second prong of the *Lemon* test in advancing religion.

The precept is that the activity complained of must neither advance nor inhibit religion. This is the basic balance to be struck between the Separation Clause and the Free Exercise Clause of the First Amendment of the Constitution. The court has found no violation of this particular prong of the *Lemon* analysis in the employment of a chaplain, at public expense, to open with prayer the sessions of the Nebraska legislature; *Marsh v. Chambers*, 463 U.S. 783 (1983). The forum at issue in the *Marsh* case would certainly present the appearance of an activity more likely to impact upon individuals who perhaps do not wish such contact with religion than any facts that have been presented in the case at bar.

In the environment of BMC, the activities of the chaplain, be it the full-time chaplain, Maggie Rogers, or any of the volunteers, are, essentially, private conduct occurring between the chaplain and the individual patient. The presence of a chaplain, volunteer or

employed, in and of itself, does not constitute the advancement of religion, nor does the fact that a chaplain may interview new admittees, wear a nametag or have an office with a nameplate on it, or that patients are asked (not required) to complete an admission form which includes a question on religious preference. Beyond that, the more specific activities of a chaplain occur only at the *request* of the patient, be they prayer with a patient, grief counseling, Bible reading, of theologic discussion. Such activities are, as the facts of this case clearly establish, not in the nature of proselytization and not conduct which advances religion, but rather are conduct which, if prohibited, would in fact inhibit the individual patient's right to freely exercise his or her religious belief, faith, or concept of spirituality. In that context, this case is not comparable, factually, to the Establishment Clause – school cases upon which Petitioners rely so heavily in their Petition for Writ of Certiorari; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Aguilar v. Fulton*, 437 U.S. 402 (1985); and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). In each instance, the Establishment Clause – school cases deal with conduct which either impacted upon all of the affected students in the particular school environment or, in the alternative, involved an activity or conduct that was not necessary from the standpoint of accommodating the free exercise of religious beliefs of the constitutency sought to be served; in addition, factually the *Aguilar* and *Grand Rapids* decisions turned, in substantial part, upon the finding by the Supreme Court of excessive governmental entanglement in the religious activity involved. The school cases, in the main, do not address or turn upon the free exercise clause, in striking the appropriate

balance required by the *Lemon* criteria. That balance and the free exercise concept are much more acute in the case at bar, where it is apparent that to prohibit or restrict chaplains, volunteer or employed, would be to effectively inhibit the free exercise of religious beliefs and freedoms on the part of patients at BMC. The status of the chaplain, as volunteer or employed, is not particularly germane to this aspect of the *Lemon* analysis.

The Court of Appeals of the Eighth Circuit correctly addressed the purpose and the performance of the chaplain:

> The district court's findings stress the fact that the existence and nature of the religious content in Rogers' services to a patient depended entirely on the patient's pre-existing preferences:
>
> > The record is clear that Chaplain Rogers does perform her duties consistent with the concept of Clinical Pastoral Education (CPE). The explanation of this concept demonstrates that in this setting, the chaplain's function is not the traditional parish-or institutional-style ministry. Rather, its purpose is to address the needs of the individual patient, as defined by the patient, not the chaplain. Proselytization or and effort to impact [sic] religion or religious beliefs upon individuals who do not already have such beliefs is totally inconsistent with the CPE concept and is scrupulously avoided by Chaplain Rogers.
>
> 667 F. Supp. at 1274. The district court also found that Rogers "does not view her primary focus as religious." Id. at 1281. The evidence supported these findings of neutrality. Rogers' testimony established that patients of all persuasions may take advantage of her counseling on their own terms, and there was testimony by one chaplain from another hospital (who was also trained in C.P.E.) about a recent

> instance in which an atheist patient had come to him for grief counseling. June 26, 1987 Tr. 37.
>
> The taxpayers argue that the chaplaincy violates the effect test by inculcating particular beliefs, by subsidizing religious activities, and by effecting a "symbolic link" between church and state.
>
> The district court's findings that Rogers has avoided proselytization show that there is no direct advancement of religion by Broadlawns inculcating any religious belief or practice.
>
> 857 F.2d at 455

As emphasized above, the constitutional focus is on the purpose of the complained of activity or its actual performance. If neither are a direct advancement of religion, the activity passes the second *Lemon* element, the unfounded speculations of proselytization notwithstanding.

The Seventh Circuit Court of Appeals recognized in *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), in a case involving, indirectly, the provision of chaplaincy services within Veteran's Administration Hospital facilities, the same neutral balance:

> If there was not a chaplaincy program, veterans might have to choose between accepting the medical treatment to which their military service has entitled them and going elsewhere in order to freely exercise their chosen religion.
>
> 782 F.2d at 709.

The same can be said for patients at BMC, a public, county hospital, which not only provides patient care for residents of Polk County, Iowa, who are in need of medical attention and who do not have the wherewithal or desire to go elsewhere, but performs, in essence, the function of a local mental health institute, in having

psychiatric patients, as well. This is not a situation comparable to that in *Ford v. Manuel*, 629 F.Supp. 771 (N.D. Ohio 1985), where an impermissible, nonsecular interest is advanced by creating the appearance of official support for religion on the part of impressionable children.

The proper distinction was made by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in discussing the impact a creche included by a city in its annual Christmas or holiday exhibit,

> We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon (religion) is, for that reason alone, constitutionally invalid." Nyquist, supra, 413 U.S. at 771, 92 S.Ct., at 2965; see also Widmar v. Vincent, 454 U.S. 263, 273, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981). Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.
>
> 465 U.S. at 683.

The indirect benefit, if any, to religion involved in the employment of a chaplain is comparable to that of the municipal erection of a creche at Christmas time in that the activities of a chaplain are focused upon the individual, having no direct or even widespread involvement in the ongoing activities of a publicly-supported hospital. The argument of Petitioners that the basic employment of

a chaplain is the advancement of religion per se is a simplistic approach to the problem, and would have resulted, in *Lynch* and *Marsh*, for example, in completely different decisions if the analysis stopped at the concept or definition at issue. The actual functioning of a chaplain, both in terms of the concept as defined by the various individuals who testified in the trial proceeding and certainly as elaborated upon by the chaplain herself, throughout her testimony, and relied upon by the Court of Appeals of the Eighth Circuit, makes it clear that any connection to religion is indirect in the employment of a chaplain, and certainly the testimony is clear and unequivocal that the intended beneficiary of the employment of a chaplain had nothing at all to do with a particular religion, denomination, or the advancement of religion, but rather, the provision of services to patients, family members and employees of the hospital; see and compare *Hunt v. McNair*, 413 U.S. 734 (1973).

The Court of Appeals for the Eighth Circuit correctly Held that the employment of a chaplain by Broadlawns Medical Center did not violate the second element of the *Lemon* test, by impermissibly advancing religion in any direct fashion, and on that basis, the decision of the Court of Appeals of the Eighth Circuit should not be reviewed by this Court, and the Petition for Writ of Certiorari should be denied.

3. The Employment Of A Chaplain By Broadlawns Medical Center Does Not Create Excessive Entanglement Between Government And Religion.

Both the district court and the Court of Appeals for the Eighth Circuit find that the challenged practice, the employment of a chaplain by a public, county hospital, did not give rise to undue entanglement between church and state.

Excessive governmental entanglement is the final aspect of the three-prong analysis required by the *Lemon* criteria. Certainly this is not, factually, a situation comparable to the Establishment Clause – school cases, such as *Aguilar v. Fulton*, 437 U.S. 402 (1985), and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), where public assistance, in different forms, provided to religious educational institutions was determined to be in violation of the Establishment Clause on the basis of excessive governmental entanglement in the religious nature of the educational institutions involved. There is not, factually, in the employment of a chaplain at Broadlawns Medical Center, the interaction of church and state in the administration of the direct services of a chaplain to the patients at Broadlawns Medical Center that has resulted in a conclusion of excessive governmental entanglement, see *Aguliar* and *Grand Rapids*. The employment of a full-time chaplain at Broadlawns Medical Center does not cause anyone, even the chaplain herself, operating within the parameters of clinical pastoral education, as it has been defined in the trial proceedings, to become excessively involved in determining what is or is not religious. There is no evidence to suggest that Broadlawns Medical Center, its employees, administrators or trustees, will become

involved in any continuing surveillance, to an impermissible degree, in order to maintain the constitutionally required separation between church and state, which also can constitute excessive entanglement; see *Bell v. Little Axe Independence School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985).

The Petitioners' complaints concerning the fact that the chaplain is an employee of Broadlawns Medical Center, and would be treated as any other employee in terms of payment, evaluation and a day-to-day relationship with her supervisor significantly mischaracterizes the concept of excessive governmental entanglement as previously defined by this Court. The Court of Appeals of the Eighth Circuit accurately recognized that a public, county hospital cannot escape entanglement with patients' religious problems and, focusing once again with constitutional clarity, recognized that the employment of a chaplain will in fact reduce the entanglement that could exist and did exist at Broadlawns Medical Center with unsupervised, volunteer chaplains; 857 F.2d at 456.

The decision of the Court of Appeals of the Eighth Circuit on the third prong of the *Lemon* test, the existence of excessive governmental entanglement, was accurate and does not provide the basis for this Court to grant the Petition for Writ of Certiorari.

II.

THE FREE EXERCISE CLAUSE PERMITS BROADLAWNS MEDICAL CENTER TO EMPLOY A CHAPLAIN.

The Petitioners, as they have throughout the proceedings, choose to characterize this issue as one of compulsion as opposed to a permissible accommodation of free exercise rights.

The issues in the case at bar directly impact upon the opportunity which patients at Broadlawns Medical Center, either psychiatric or medical, have to freely exercise their chosen religious beliefs, and in that instance, are comparable to the factual circumstances involving veterans who are patients at hospitals operated by the Veteran's Administration; see *Katcoff v. Marsh*, 755 F.2d 223 (2nd Cir. 1985), and *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986); as well as being comparable to the factual circumstances of individuals in penal institutions in Iowa; see *Rudd v. Ray*, 248 N.W.2d 125 (Iowa 1976).

Patients at Broadlawns Medical Center are not required by the government to stay at the hospital, as a prisoner in a penal institution is required to stay. However, from a more realistic viewpoint, patients in a hospital are significantly limited in their mobility, at least for the period of time of their hospitalization, and are not truly able to leave at any time, so as to be able to freely accommodate their own individual religious beliefs and preferences. Likewise, to assume that family members of patients or staff of Broadlawns Medical Center have free and easy access to their own minister or counselor, at the critical times of need, is simply not realistic.

Broadlawns Medical Center treats indigents who have no other place to go, who may have no regular minister or their own, and who obviously have no hospital alternatives, and who, comparable to the veterans seeking medical services in facilities operated by the Veteran's Administration, should not have to choose between accepting medical treatment to which they are entitled or going elsewhere in order to freely exercise their chosen religion; see *Baz v. Walters,* supra, at 709.

Individuals have the constitutional right to exercise, freely, their own choice of spirituality or religion, even in the context of Broadlawns Medical Center. It is that very concept which provided the basis for Justice Douglas in *Zorach v. Clauson,* 343 U.S. 306 (1952), to state,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government shows a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
>
> 343 U.S. at 313-14.

The concurring opinion of Justice Brennan, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), correctly expresses the ultimate, legal conclusion pertaining to the free exercise rights of patients at Broadlawns Medical Center:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be * * *
>
> The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. * * *. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, * * *.
>
> 374 U.S. at 296-98.

The issue is not one as the Petitioners would characterize it of individuals compelling the government to provide a chaplain, but rather one of whether or not

Broadlawns Medical Center can accommodate the free exercise of rights of patients and family members. The Court of Appeals for the Eighth Circuit held, correctly, that Broadlawns Medical Center could, and that decision, on that issue should not provide the basis for the Court to grant the Petition for Writ of Certiorari.

CONCLUSION

The constitutional issues of import in this case were completely and correctly addressed by the Court of Appeals of the Eighth Circuit. Review by the Supreme Court of the United States is not necessary in this case for there to be a clear and accurate statement of the law concerning the application of the Establishment Clause to the facts in this case and the interrelationship of the Establishment Clause with the Free Exercise Clause. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

BROADLAWNS MEDICAL CENTER

Des Moines, Iowa

DEPARTMENT OF SOCIAL SERVICE

TITLE: CHAPLAIN SERVICES

DATE: December - 1985

APPROVED BY: Department of Social Services
Department of Nursing

DISTRIBUTION TO: Nursing Administration
Hospital Administration
Medical Education
Department of Psychiatry

PURPOSE: To provide consistent pastoral care throughout the Medical Center, adding spiritual support and counseling to the ongoing healing effort.

POLICIES:

A. Services provided by the hospital Chaplain:

1. Making preoperative calls whenever possible.

2. Upon referal

   a. visiting with critically ill and emotionally distressed patients and families, acknowledging and helping them to explore their feelings.

   b. visiting the terminally ill to provide a ministry of concern and support.

c. offering counseling for particular religious and emotional problems (making referrals to other professionals when indicated).

3. Performing sacraments of Communion and Baptism on request.

4. Providing counseling and spiritual support for Staff as requested and appropriate.

5. Participating in on-call coverage.

6. Weekdays, 8-4:30, being available for support of families at times of death and other crises (i.e. Code 99).

7. Acting as consultant to physicians, nursing staff and other care providers regarding problems, goals and other issues related to spiritual issues that may arise.

8. Contacting other clergy or religious groups at patient/family request.

9. Acting as corrdinator, recruitor and supervisor of Volunteer chaplains at BMC.

10. Coordinate and sometimes direct weekly interdenominational church services of approximately one half hour at 1:15 PM each Sunday in the Nauraine Conference Room, Sands Wing.

11. Chaplain may be contacted through the Social Service Department (or beeper) during regular work hours. The on-call Chaplain may be contacted through the Switchboard operator at other times.

B. Services performed by Volunteer Chaplains:

1. Visiting newly admitted patients to help them with the anxiety of illness and hospitalization and to orient them to the availability of a fulltime Chaplain.

2. Referring patients with ongoing spiritual/emotional needs to fulltime Chaplain.

3. Participating in on-call coverage and worship leadership.

4. When on-call, being available to patients, families and Staff at times of death and other crisis situations.

5. Performing related duties as required.

December, 1985